No. 89-944 (2)

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF GEORGIA,
Petitioner,

V.

THOMAS D. STEWART
AND BARBARA STEWART,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SCOTT AND QUARTERMAN
ATTORNEYS AT LAW

Russell T. Quarterman
Lead Counsel of Record

Bradley S. Wolff

P.O. Box 1232
Athens, GA 30603
(404) 543-8596

14 pp

QUESTION PRESENTED

Should this Court grant certiorari to consider the propriety of an order suppressing evidence obtained in a warrantless search of a rented, locked mini-warehouse which search was based upon the consent of a third-party who had never been to the property, who had no key or other access to the property, had no idea of what was inside the mini-warehouse and whose only connection to the property was that he had acted as a "straw man" for the real tenant of the property in dealings with the owner of the mini-warehouse?

TABLE OF AUTHORITIES

Chapman v. United States, 365 U. S. 610, 81 S.Ct. 776, 5 LE2d 828 (1961) 4

Katz v. United States, 389 U.S. 347, 357 (1967) 6

Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1985) 6

United States v. Block, 590 F.2d 535 (4th Cir. 1978) 2

United States v. Botsch, 364 F.2d 542 (2nd Cir. 1966) 3–5, 7

United States v. Diggs, 544 F.2d 116 (3rd Cir. 1976) 3, 5–8

United States v. Gunter, 546 F.2d 861 (10th Cir. 1976) . . 2

United States v. Impink, 728 F.2d 1228 (9th Cir. 1984) . . 2

United States v. Matlock, 415 U. S. 164, 94 S.Ct. 988, 39 LE2d 242 (1974) 2–4, 6, 8

United States v. Selberg, 630 F.2d 1292 (8th Cir. 1980) . . 2

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REASONS WHY THE WRIT SHOULD NOT BE GRANTED IN THIS CASE

Certiorari should not be granted in this case because the State of Georgia advances no argument to this Court upon which the decision of the Court of Appeals of Georgia should be reversed and the decision of the Court of Appeals of Georgia is in conformity with long-standing and appropriate authority.

Both the trial court and the Court of Appeals of Georgia based their opinions in this case upon the rationale and test set out in this Court's decision in *United States v. Matlock*, 415 U. S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Since its announcement, the *Matlock* test has been the established guide for determining the validity of third-party consent to search and has been applied throughout the country in the numerous cases involving the validity of third-party consent. *See*, e.g., *United States v. Impink*, 728 F.2d 1228 (9th Cir. 1984); *United States v. Selberg*, 630 F.2d 1292 (8th Cir. 1980); *United States v. Block*, 590 F.2d 535 (4th Cir. 1978); *United States v. Gunter*, 546 F.2d 861 (10th Cir. 1976).

The State of Georgia argues that because *Matlock* involved a third-party consenter who had access to the searched premises by reason of being a resident therein, this Court should grant certiorari to announce a different rule for third-party consent in cases where the third-party consenter has no direct access and control of the premises. In support of its argument

that the decision of the Court of Appeals of Georgia should be reversed, the State of Georgia relies entirely upon the decisions in *United States v. Botsch*, 364 F.2d 542 (2nd Cir. 1966) and *United States v. Diggs*, 544 F.2d 116 (3rd Cir. 1976). Because these cases are of little or no value as precedent, and because the test set out in the *Matlock* decision encompasses and correctly determines the issue presented in the present case, this case does not present a situation in which a state court has decided a federal question in a way which conflicts with either the binding decision of a federal court of appeals or applicable decisions of this Court and the Court should refuse to grant certiorari.

A. THE CASES RELIED UPON BY THE STATE OF GEORGIA HAVE LITTLE OR NO VALUE AS PRECEDENT AND SUPPLY NO GROUNDS FOR THE GRANT OF CERTIORARI IN THIS CASE.

U. S. v. Botsch, *supra*, 364 F.2d 542, was decided in 1966 and thus, to the extent that it may conflict with this Court's decision in *Matlock*, was impliedly overruled. For the most part, however, the decision in *Botsch* is entirely consistent with the

spirit of *Matlock*. *Botsch* involved a landlord, Stein, who was actively, though innocently, involved in the illegal activities of his tenant, Botsch. Botsch had supplied Stein with a key to the rented premises and authorized Stein to enter the premises for the purpose of receiving and storing stolen property. On these facts alone, the Second Circuit Court of Appeals could have found that Stein had sufficient access and control over the property to give effective consent to a search of the property and that decision would have been entirely consistent with this Court's later ruling in *Matlock*. Prior to the *Botsch* decision, in *Chapman v. United States*, 365 U. S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) this Court had already decided the question presented in this case when it held that a lessor who does not retain access has no authority to consent to a search of the leased property. In fact, it was the landlord's possession of a key to the premises and expressly authorized access to the property which the *Botsch* court used to distinguish the case before it from the facts of *Chapman*. *U. S. v. Botsch*, *supra*, 364 F.2d at 547–548.

Since the *Botsch* opinion distinguishes itself from cases wherein a landlord has no right of access or use of the leased premises, this decision clearly does not apply to the facts of the instant case, wherein Root, the third-party consenter had never been to the property, had no key to the property, and no authority from the Stewarts to enter, use, or in any way access the property. Furthermore, the precedential value of *Botsch* has been severly eroded by the fact that some of the decisions upon which it was based have since been overruled. See *U. S. v. Diggs*, *supra*, 544 F.2d at 133, fn. 24 (Van Dusen, C. J., dissenting).

Likewise, the State's reliance upon *United States v. Diggs*, 544 F.2d 116 (3rd Cir. 1976) is entirely misplaced. Not only does *Diggs* not lend persuasive authority to the State's argument in the instant case, but that split decision is of no precedential value for the proposition put forth by the State in any case. The *Diggs* decision consisted of four judges voting to reverse the District Court's suppression of evidence, four judges voting to affirm, and two judges concurring, in separate opinions, with the

result that the lower court's order was vacated and the case remanded for further findings.

B. THERE IS NO NEED FOR AN "UNWITTING ACCOMPLICE" EXCEPTION TO EITHER THE 4TH AMENDMENT WARRANT REQUIREMENT OR THE THIRD-PARTY CONSENT EXCEPTION AS SET FORTH IN *U. S. V. MATLOCK.*

"In a long line of cases, this Court has stressed that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the fourth Amendment -- subject only to a few specifically established and well deliniated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 (1967)." *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1985).

The State relies upon *U. S. v. Diggs, supra*, in an attempt to justify a new exception to the Fourth Amendment based upon the theory that an "unwitting accomplice" somehow gains authority to consent to a search of property owned or controlled by another. While a portion of the *Diggs* court does purport to

create such an exception based upon dicta in *Botsch*, *supra*, it does so in the context of a custodian of the property, and does not address the issue of a person who has no present access or control over the property. *Id.* at 120–122. The State also puts forth the proposition that Garnett Root somehow became an "unwitting accomplice" in the alleged wrongdoings of the Stewarts by renting the warehouse in his name before the alleged crimes took place and offers no explanation as to how, under this state of facts, Root could be implicated in any of the Stewarts' crimes.

The theory that an "unwitting accomplice's" interest in exculpating himself from any taint of wrongdoing sufficiently overrides the privacy interests of the person controlling the property to obviate the need for a warrant is aptly refuted in Judge Van Dusen's dissent in *Diggs*, which states:

> Whatever interest Bradley had in purging himself of any possible taint ceased to operate once Bradley had notified the authorities of the existence of the locked box, explained the circumstances surrounding his possession of it, and

> physically turned the box over to Government agents....
>
> Because I cannot understand how a two-hour delay would denigrate Bradley's purported "right" to exculpate himself or how an immediate search would further Bradley's legitimate interests, I am unable to see how Bradley's exercise of the "right" to exculpate has any bearing on the need for a warrant or can furnish any excuse for circumventing the warrant requirement.

U. S. v. Diggs, 544 F.2d at 132, 133. Likewise, in the present case, whatever "right" Garnett Root had to exculpate himself from the possible taint of association with the Stewarts' activities was exercised by his notification of the authorities and his willing assistance to the authorities, such as his participation in obtaining, at the request of the authorities, rent from Mr. Stewart.

The proper test of whether an individual has the power to authorize a search of property owned, controlled, or used by another who is the target of the search remains the test set out in *U. S. v. Matlock, supra*. If the third-party consenter has sufficient interest in the property, he can give his consent to the search; if the third-party has sufficient information concerning

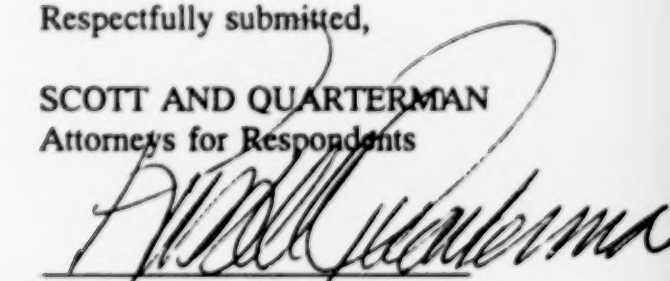
the activities of the target of the search to supply the police with probable cause, the police can get a warrant and conduct their search; but where, as in this case, the police have no probable cause to secure a warrant and conduct the search and the target of the search has taken sufficient measures to insure his privacy interest in the property, the Fourth Amendment demands that police not be allowed to invade protected privacy interests merely because some person tangentially connected with the activities of the target requests that property of the target be searched.

CONCLUSION

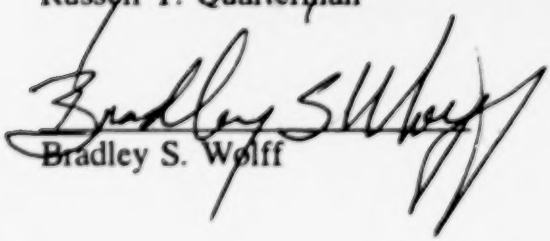
For all of the above stated reasons, Respondents respectfully submit that this case does not meet the criteria of great concern, gravity, and importance to the public necessary for the issuance of a writ of certiorari and the State's petition should, therefore, be denied.

Respectfully submitted,

SCOTT AND QUARTERMAN
Attorneys for Respondents



Russell T. Quarterman



Bradley S. Wolff

CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Brief For The Respondents In Opposition upon opposing counsel by having said copies hand delivered to the Office of the District Attorney, 325 E. Washington St., Room 500, Athens, GA 30601 in the manner provided for by law and the rules of this court.

This 20 day of February, 1990.

Russell T. Quarterman
Attorney for Respondents